

BNSF RAILWAY COMPANY, a )  
Delaware Corporation authorized to )  
do business in Nebraska, )

Plaintiff, )

# MEMORANDUM AND ORDER

SEATS, INCORPORATED, a  
Wisconsin Corporation,

Defendant. )

Count I:      Products Liability (Negligence)

Count II: Products Liability (Strict Liability)

Count III: Breach of Contract (Third-Party Beneficiary)

### Count IV: Equitable Subrogation, Indemnity, or Contribution

Because this court dismissed all of BNSF’s claims based upon LIA preemption, it did not consider the other arguments for dismissal asserted by Seats, Inc.—that is, Count III should be dismissed because BNSF was not an intended third-party beneficiary of the contract under which the allegedly defective seat was sold, and Count IV should be dismissed because Seats, Inc., and BNSF did not share a common liability, which is a prerequisite to recovery under theories of indemnity, contribution,

and subrogation. (Def's Br. Supp. Mot. to Dismiss, Filing No. 9 at CM/ECF p. 2.) In its opinion reversing this court's preemption decision, the Court of Appeals remanded the matter to this court to consider Seats, Inc.'s alternative arguments for dismissal "in the first instance." (Filing No. 24 at CM/ECF pp. 6-7.)

Because the Motion to Dismiss that was the basis for the above-described appellate proceedings was filed almost two years ago (Filing No. 8), and because case law may have developed since that time that applies to this court's analysis of the remaining two issues to be decided, I shall order the parties to submit updated briefing.

Accordingly,

IT IS ORDERED:

1. The Clerk of Court shall reactivate as a pending motion the Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) filed by Defendant Seats, Inc., (Filing No. 8); and

2. Defendant Seats, Inc., shall file an updated brief in support of its Motion to Dismiss (Filing No. 8) on or before September 27, 2018, 2018; Plaintiff BNSF shall file a brief opposing the Motion to Dismiss within 21 days after the Defendant's brief is filed and served; and Defendant shall file a responsive brief within 7 days after the Plaintiff's brief in opposition is filed and served.

DATED this 6<sup>th</sup> day of September, 2018.

BY THE COURT:

*s/ Richard G. Kopf*  
Senior United States District Judge